IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

BRIAN SPEER	)	
Appellant	)	
vs.	)	Case No. SD 25685
NEYSA COLON	)	
Respondent	)	

IN THE JASPER COUNTY CIRCUIT COURT
TWENTY-NINTH JUDICIAL CIRCUIT
Before the Honorable Jon Dermott
Case No. CV195-613DR

AMENDED BRIEF OF APPELLANT

REVISED 11/17/03

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JURISDICTIONAL STATEMENT

This is an action for modification of an existing court order and judgement of paternity action involving the custody, visitation and child support for the minor child of Appellant and Respondent. The trial court abused its discretion by modifying the joint physical custody order, by modify Appellants custodial periods, by not awarding residential custody to Father, and by modify the child support amount. The case does not involve the validity of a treaty or statute of the United States, validity of a statute or provision of the Constitution of the State of Missouri, the construction of the revenue laws of the State of Missouri, the title to any state office of the State of Missouri, nor is it a case where the punishment imposed is death. Therefore, the Court of Appeals has general Appellate Jurisdiction under Article 5, Section 3 of the Missouri Constitution. The case was tried in the Circuit Court of Jasper County, Missouri. Therefore, territorial jurisdiction is in this Court, the Southern District of Missouri Court of Appeals, Section 477.060, RSMo. 1994.

STATEMENT OF FACTS

Appellant respectfully submits his Statement of Facts relevant to this appeal. An order and judgement was entered by the court of Jasper County On December 6, 1996 adjudication that Brian Ray Speer, herein Appellant is the biological Father of the minor child, Jose Alejandro Speer, born October 30, 1994. Neysa Colon, herein Respondent is the biological Mother of the minor child. The court had awarded the parties joint legal and joint physical custody of the minor child, awarding Respondent primary care and custody (L.F 27-32).

On March 4, 1999, Respondent, filed with the Circuit Court of Jasper County, a Motion to Modify. (L.F. 33). In her Motion to Modify, Respondent argues that the previous child support order is unjust and unreasonable in that, Appellant, is making a substantially higher salary; and that the minor child of the parties, Jose, is in need of a higher support amount. (L.F. 34). Neysa Colon also attached a proposed parenting plan as well as a proposed Form 14. (L.F. 34). In response Appellant filed a Counter-Motion to Modify with the Court on April 2, 1999. (L.F. 38). Appellant stated in his petition that there have been substantial and continuing changes in circumstances warranting a modification of the decree entered on November 15, 1996. These changes include: acts by the Respondent to poison the minor child against his Father, that Respondent, has denied Father visitation as granted by the original decree and has also denied access to the minor child by his Father, and that Respondent, has a violent

and ungovernable temper and that Mother also threatens to abscond with the child. (L.F. 38, 39). Appellant, also included with his Counter-Motion to Modify, a proposed parenting plan. (L.F. 39). On the 7th day of March 7, 2000 the court entered an Order of Modification of Judgement Entry modifying the initial Order and Judgement of December 6, 1996. (L.F. 41-51). The Court found that there has been a substantial change of circumstances since the entry of the initial Order and Judgment entered on December 6, 1996. (L.F. 41). The Court ordered the parties to continue to have joint legal and physical custody of the minor child, Jose Speer with Mother designated as primary custody. (L.F. 42, 45). The Form 14 prepared by Father was found by the Court to not be unjust or inappropriate. Child support was ordered in the amount of One Hundred and Fifty-Five Dollars ($155.00) per month to be paid by Father to Mother (L.F. 48). The Court ordered that Brian Speer was eligible to claim the minor child, Jose Speer, as a tax exemption on his federal and state income tax returns on even numbered years. (L.F. 50). The Court denied a request by the Mother, Neysa Colon, requesting to have the child delivered to a neutral location as opposed to her residence. (L.F. 51).

On or about October 22, 2001, a juvenile officer of Jasper County filed a Petition alleging that the minor child, Jose Speer, had extensive bruising on his upper thigh and buttocks. The bruises appeared to be recent and the caused by the use of a strap or belt. Jose Speer, stated that his Mother had spanked him. Respondent, stated that she had spanked the minor child, and was arrested at her home. (L.F. 52). On

November 2, 2001, an Order of Child Protection was entered in the Circuit Court of Jasper County, Missouri. The Court found probable cause after receiving testimony and other evidence to detain the minor child, out of the custody of his parents pending hearing on the Petition. (L.F. 53). Appellant , on November 14, 2001, filed a Motion to Modify Order of Modification of Judgment Entry Dated March 7, 2000 seeking residential placement of the parties minor child. (L.F. 54). For his petition, Brian Speer, stated that there had been changed circumstances involving the order of custody because of the physical abuse committed by the Respondent, Neysa Colon, against the minor child, Jose Speer. (L.F. 54, 55). On February 1, 2002, Brian Speer filed a Motion to Consolidate the pending Motion to Modify Order of Modification of Judgment Entry and the pending Juvenile case, regarding the minor child Jose Speer. The cases requested for consolidation were as follows: 01JU679696 and CV195-613DR. (L.F. 57). On February 5, 2002, Respondent filed a Motion in Opposition to Consolidate Cases. (L.F. 5). The Court granted the Motion to Consolidate filed by Appellant on February 7, 2002. (L.F. 5, 60).

A hearing was held on February 21, 2002, in which all parties were present. Following testimony and evidence, the Court takes disposition under advisement and finds jurisdiction is proper. (L.F. 63).

A Request to Dismiss Jurisdiction was filed on June 3, 2002, by Chad Adams, Deputy Juvenile Officer. The child's psychologist, Judy Garrity recommended to return

the child to the Mother's primary placement. (L.F. 64). Dismissal Order as to Juvenile Court Jurisdiction was granted and filed on June 3, 2002. (L.F. 64).

Appellant filed an Application for Contempt Citation on November 4, 2002. (L.F. 65). The basis for this contempt application was a willful refusal and denial of access to the minor child by Respondent (L.F. 66). Father stated in his petition that Respondent refused to comply with an order of the Court that the Mother produce the minor child for a psychological evaluation and that Respondent willfully failed and refused to comply with the court order regarding visitation between the minor child and his Appellant for the child's Birthday (L.F. 66). The Court issued an Order to Show Cause (L.F.2, 69).

The hearing was held on March 17, 2003 in the Circuit Court of Jasper County, Missouri, Division III, at Joplin. The Honorable Jon Dermott presided. Appellant testified that he believes that there has been a substantial and continuous change in circumstances as to the custody of the minor child. Appellant request the court to award him residential custody due to the physical abuse by the Respondent. (Tr. 6). Appellant testified he believes the minor child, Jose Speer, is emotionally fearful of his Mother due to physical abuse. (Tr. 6). Father stated, he had talked to the Respondent at or near the time of the assault upon the minor child. That Mother stated the children had pissed her off. Appellant had attempted to talk to the child at that time and was told he was not available. (Tr. 9). Father also stated concern he had about the Mother's verbal abuse, screaming, cussing and disciplinary performances upon the

minor child. Father also testified that when the minor child told his Mother and her boyfriend that he wanted to live with his Father, the boyfriend would mess up his room and throw his stuff off his desk and then make the child clean his room. The Father stated Mother was not giving the Father custody while she was working and was leaving the child with other people. (Tr. 20). Father testified that he no longer received the child every day after school. (Tr. 22). Additionally, Brian Speer stated the minor child, Jose Speer, had become emotionally fearful of his Mother, the Respondent, Neysa Colon, and that these circumstances constituted a substantial and continuing change since the previous order of March 7, 2000. (L.F. 55). The minor child was physically placed with the Appellant for approximately six months (Tr. 19). Appellant testified of Mothers contempt regarding the denied visitation of the child on his birthday and for the psychological evaluation. (Tr. 21).

Appellant offered Petitioners proposed parenting plan at trial. (L.F. 75, Tr.25). Appellant testified that he had previous concerns about the child's welfare and now Mothers abuse to the child had came to light. (Tr.23). Father stated his plan would be in the minor child's best interest. (Tr. 24). The Father testified to and offered his form 14 exhibit 2 in the amount of One Hundred Fifty Dollars ($150.00) seeking it to be paid by Mother to Father. (L.F. 85, Tr. 25, 60).

Father called a licensed professional counselor, Hickey who had evaluated the minor child. (Tr. 61, 65). Hickey stated he had been denied access to the minor child, however he was then able to see the child five times. (Tr. 65, 66). Hickey testified

that the child disclosed he was afraid of his Mother that she had abused him before and that Mothers boyfriend, Robert had kicked him in the ribs and used Karate practice to beat on him. (Tr. 70). Hickey stated that he looks for if a child had been coached and that he did not believe the child had been coached. (Tr. 72).

At trial Respondent testified that she spanked the minor child too hard. (Tr. 140). That she spanked the child because he had no sense of responsibility at that time and when questioned about previous allegation of abuse she admitted to "smacking him on the head". (L.F. 163). There was evidence presented at trial consisting of photos of the minor child demonstrating extensive bruising on the child's thighs and buttocks. (Tr. 13). Respondent offered a form 14, Respondent's Exhibit B setting support at Two Hundred Sixty-Four dollars and Nine cents ($264.09). Mother did not identify nor offer a proposed parenting plan. Respondent filed an answer to Appellant's Motion to Modify with no Counter pleadings. (L.F. 4, Tr. 282).

The minor child testified that he went to the emergency room because his Mother had spanked him with a belt and that he had been spanked with a belt before. (Tr. 259). The child also identified the belt that he was struck with as Pettitioner's Exhibit 8, not Exhibit 5. (Tr. 261). The Mother testified that she had struck him with the belt she identified as exhibit 5 and had produced to Officer Fox. (Tr. 54, 166). The child testified that he wanted to live with his Father. (Tr. 262). The child testified that his Mother makes him put his hand out straight with cans for five or ten minutes and it really does hurt. (Tr. 263, 264). The child testified that one day the Mother

made him hold cans and was cussing in his face. (Tr. 264). The child testified before he got to see his Father more than his mom and now his mom more than his dad. (Tr.265).

Judy (Garrity) Kellenbereger, a licensed psychologist testified that Appellant brought his son, Jose Speer to see her for counseling. Ms. Kellenberger added that this was subsequent to substantiated abuse by the Mother. (Tr. 203). Additionally, Ms. Kellenbereger stated that during the sessions the child was very honest and matter of fact. The child stated, "my mom hurts me sometimes. She spanks me. She spanked me with a belt." (Tr. 204).

After all evidence had been present and submitted to the court the trial Judge states, "I'm not changing any thing". (Tr. 278). The trial Judge further added that the Father should have first opportunity, custody of the child if Mother was at work stating the he was adopting the parenting plan as of today with the caveat of eliminating Fathers visits on Wednesday. (Tr. 281, 282). The trial court stated he thinks he could modify support even thought an objection had been made that the Respondent had not plead for a modification of child support. (Tr. 282).

The Court enters a docket entry on March 17, 2003, stating, "The parties appear with counsel. Hearing held. Motion to Modify is denied. Child support is to be computed in accordance with the current earnings history. Mother's parenting plan is adopted. JD". (L.F. 1).

The trial Court entered a Judgment of Modification on May 7, 2003, the trial court amended the March 7, 2000 order by awarding the parties joint legal custody of the minor child, with Mother have primary physical custody of the child and modified Fathers visitation. (L.F. 124-130). The trial court increased the amount of child support paid by Father to Mother from the amount of One Hundred Fifty-Five dollars ($155.00) to Two Hundred Sixty-Two Dollars and Forty-four cents ($262.44). The trial court deviated in this amount from the Form 14 submitted by Appellant, as well as the Form 14 provided by Respondent. (L.F. 126). The court did not submit it's own Form 14. From this order the Appellant perfected this appeal.

POINTS RELIED ON

I

THIS COURT SHOULD REVERSE THE TRIAL COURT DECISION BECAUSE IT MODIFIED THE PARTIES JOINT LEGAL AND JOINT PHYSICAL CUSTODY TO JOINT LEGAL WITH PRIMARY PHYSICAL CUSTODY TO RESPONDENT AND ITS MODIFICATION OF THE CUSTODIAL PERIOD OF THE APPELLANT WAS MANIFESTLY ERRONEOUS, WAS NOT SUPPORTED BY EVIDENCE, WAS AGAINST THE WEIGHT OF SUBSTANTIAL EVIDENCE, AND THE WELFARE OF THE CHILD REQUIRES A DIFFERENT RESULT; BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN NOT CONSIDERING NOR MAKING ANY SPECIFIC FINDINGS AS TO THE RELEVANT FACTORS OF SECTION 452.375.2 RSMO (1998) AND 452.410 RSMO IT FAILED TO DETERMINE THE BEST INTEREST OF THE MINOR CHILD AS REQUIRED BY 452.375.6 RSMO (1998); BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN NOT CONSIDERING NOR MAKING ANY FINDINGS WITH REFERENCE TO THE PUBLIC POLICY OF THE STATE OF MISSOURI DECLARED IN SECTION 452.375.4 RSMO (1998) AS REQUIRED BY SECTION 452.375.6 RSMO (1998), BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION AND WAS ARBITRARY IN ITS REDUCTION OF CUSTODY BY APPELLANT ABSENT ANY SPECIFIC FINDINGS THE VISITATION WOULD ENDANGER THE CHILD AS REQUIRED BY SECTION 452.400.2 RSMO (1998), BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN NOT CONSIDERING THE PHYSICAL ABUSE AGAINST THE CHILD COMMITTED BY THE RESPONDENT AND MAKING SPECIFIC FINDINGS AS TO HOW

THE VISITATION ARRANGEMENTS MADE BY THE COURT SERVE THE WELFARE OF THE CHILD AS REQUIRED BY SECTION 452.400.1 RSMO (1998).

Section 452.375 RSMo

Section 452.400 RSMo

Section 452.410 RSMo

Baker v. Welborn, 77 S.W.3d 711 (Mo. App. S.D. 2002)

Bauer v. Bauer, 38 S.W.3d 449 (Mo. App. W.D. 2001)

Gross v. Helm, 98 S.W.3d 85 (Mo. App. 2003)

Searcy v. Searcy, 38 S.W.3d 462 (Mo. App. W.D. 2001)

POINTS RELIED ON

II

THE APPELLATE COURT SHOULD REVERSE THE TRIAL COURT DECISION BECAUSE ITS DECISION TO MODIFY THE AMOUNT OF CHILD SUPPORT PAID BY APPELLANT AND TO AWARD A CREDIT FOR SUPPORT OF A MINOR CHILD IN RESPONDENT'S PRIMARY CUSTODY WAS NOT SUPPORTED BY CREDIBLE EVIDENCE, WAS EXCESSIVE, WAS AGAINST THE WEIGHT OF THE EVIDENCE AND IS A MISAPPLICATION OF THE LAW; BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION WHEN IN MODIFYING APPELLANT'S CHILD SUPPORT OBLIGATION, BECAUSE THE TRIAL COURT FAILED TO ADHERE TO THE REQUIREMENTS OF SECTION 452.370 RSMO AND 452.340 RSMO, BECAUSE THE TRIAL COURT FAILED TO ENTER FINDS REGARDING A CHANGE IN CIRCUMSTANCES MERITING A MODIFICATION OF THE SUPPORT AMOUNT AND THE AWARD TO RESPONDENT OF A CHILD CREDIT FOR A SUBSEQUENT CHILD IS CONTRARY TO BOTH FORM 14, 2 (C) AND RULE 88 GUIDELINES. THE TRIAL COURT ERRED BY REJECTING THE PARTIES FORM 14 AND NOT SUBMITTING ITS OWN.

Section 452.340 RSMo

Section 452.370 RSMo

Missouri Supreme Court Rule 88.01

Buckner v. Jordan, 952 S.W.2d 710 (Mo. S. Ct. 1997)

Davidson v. Davidson, 872 S.W.2d 606 (Mo. App. W.D. 1994)

Estrem v. Estrem, 984 S.W.2d 883 (Mo. App. W.D. 1999)

Hall v. Hall, 53 S.W.3d 214 (Mo. App. S.D. 2001)

POINTS RELIED ON

III

THIS COURT SHOULD REVERSE THE TRIAL COURT DECISION BECAUSE ITS FAILURE TO CONSIDER OR RULE ON PETITIONERS PROPERLY PLED MOTION FOR CONTEMPT AGAINST RESPONDENT FOR DENIAL OF VISITATION WAS MANIFESTLY ARBITRARY, WAS PLAIN ERROR; BECAUSE THE MOTION FOR CONTEMPT WAS PROPER UNDER SECTION 452.400.1 RSMO (1998), BECAUSE THE TRIAL COURT FAILED TO TAKE UP AT TRIAL THE MOTION FOR CONTEMPT WHICH WAS PROPERLY PLED AS REQUIRED BY SECTION 509.280.1 RSMO (1998), BECAUSE THE TRIAL COURT DID NOT TAKE THE MOTION UP AT TRIAL WITHOUT GOOD CAUSE THE COURT DID NOT MEET THE REQUIREMENTS OF SECTION 509.370 RSMO (1998).

Section 452.400 RSMo

Section 509.280 RSMo

Section 509.370 RSMo

ARGUMENT

I

THIS COURT SHOULD REVERSE THE TRIAL COURT DECISION BECAUSE IT MODIFIED THE PARTIES JOINT LEGAL AND JOINT PHYSICAL CUSTODY TO JOINT LEGAL WITH PRIMARY PHYSICAL CUSTODY TO RESPONDENT AND ITS MODIFICATION OF THE CUSTODIAL PERIOD OF THE APPELLANT WAS MANIFESTLY ERRONEOUS, WAS NOT SUPPORTED BY EVIDENCE, WAS AGAINST THE WEIGHT OF SUBSTANTIAL EVIDENCE, AND THE WELFARE OF THE CHILD REQUIRES A DIFFERENT RESULT; BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN NOT CONSIDERING NOR MAKING ANY SPECIFIC FINDINGS AS TO THE RELEVANT FACTORS OF SECTION 452.375.2 RSMO (1998) AND 452.410 RSMO IT FAILED TO DETERMINE THE BEST INTEREST OF THE MINOR CHILD AS REQUIRED BY 452.375.6 RSMO (1998); BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN NOT CONSIDERING NOR MAKING ANY FINDINGS WITH REFERENCE TO THE PUBLIC POLICY OF THE STATE OF MISSOURI DECLARED IN SECTION 452.375.4 RSMO (1998) AS REQUIRED BY SECTION 452.375.6 RSMO (1998), BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION AND WAS ARBITRARY IN ITS REDUCTION OF CUSTODY BY APPELLANT ABSENT ANY SPECIFIC FINDINGS THE VISITATION WOULD ENDANGER THE CHILD AS REQUIRED BY SECTION 452.400.2 RSMO (1998), BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN NOT CONSIDERING THE PHYSICAL ABUSE AGAINST THE CHILD COMMITTED BY THE RESPONDENT AND MAKING SPECIFIC FINDINGS AS TO HOW

THE VISITATION ARRANGEMENTS MADE BY THE COURT SERVE THE WELFARE OF THE CHILD AS REQUIRED BY SECTION 452.400.1 RSMO (1998).

This Court should reverse the trial court's decision because it did not take into consideration the relevant statutory factors and public policy nor was it supported by substantial evidence. Although a trial court's custody determination is afforded greater deference than any other type of case, a custody decision will not be affirmed unless there is credible evidence upon which the custody award is based. In re Marriage of Powell, 948 S.W.2d 153, 156 (Mo. App. 1997). A court must determine what custodial arrangement is in the best interest of the children. Spradling v. Spradling, 959S.W.2d 908, 911 (Mo. App. S.D. 1998). "A good environment and a stable home is generally considered as the most important single consideration in custody cases. " Newsom v. Newsom, 976 S.W.2d 33, 39 (Mo. App. W.D. 1998). Further, the Missouri legislature has determined what factors a trial court is to use in creating a custody arrangement that is in the best interests of the children involved. Section 452.375.6 RSMo. provides that if the parties have not agreed to a custodial arrangement, or the court determines such arrangement is not in the best interests of the child, the court shall include a written finding in the judgment or order based on the policy of subsection 4 of Section 452.375 RSMo. and each of the factors listed in subdivisions 1 through 8 of subsection 2 detailing the specific relevant factors that made a particular arrangement in the best interests of the child. Section 452.375.6 RSMo. further mandates that if the trial court rejects a proposed custodial arrangement, the court shall include a written finding in

the judgment or order detailing the specific relevant factors resulting in the rejection of such arrangement. Subsection 4 of Section 452.375 RSMo declares the policy of the State of Missouri to be that it is in the best interest of children that they have "frequent, continuing, and meaningful contact" with their parents after the dissolution of a marriage. Subsection 2 of Section 452.375 RSMo. lists the following factors that a court must consider in order to effectuate the best interests of the children involved:

(1) The wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties;

(2) The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as Mother and Father for the needs of the child;

(3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;

(4) Which parent is more likely to allow frequent, continuing and meaningful contact with the other parent;

(5) The child's adjustment to the child's home, school and community;

(6) The mental and physical health of all individuals involved, including any history of abuse of any individuals involved;

(7) The intention of either parent to relocate the principal residence of the child;

(8) The wishes of the child as to the child's custodian.Subsection 1 of Section 452.400 RSMo states the court "shall make specific findings of fact to show that the

visitation arrangements made by the court best protect the child or the parent or other family or household member who is the victim of domestic violence form any further harm." In addition the court may order a modification of "an order granting or denying visitation rights whenever modification would serve the best interests of the child, but the court shall not restrict a parents visitation rights unless it finds that the visitation would endanger the child's physical health or impair his emotional development." Section 452.400.2 RSMo. The judgment of a trial court modifying visitation will be affirmed unless it is against the weight of the evidence, there is no substantial evidence to support it, or it erroneously applies the law. Searcy v. Searcy, 38 S.W.3d 462, 469 (Mo. App. W.D. 2001).

In the Appellants case there was an original order entered regarding a custody determination through a paternity proceeding entered on November 15, 1996. (L.F. 28, 29). This order was modified by the trial court in its Judgment of Modification filed on May 7, 2003. (L.F. 124, 125). All previous orders gave the parties joint legal and physical custody. In this subsequent order the trial court provided the parties with joint legal custody, however the trial court then eliminated joint physical custody thereby placing the child in the sole physical custody of Mother, Respondent Neysa Colon. (L.F. 124). To modify an order of custody the trial court has to find a change of circumstance substantial, to modify visitation the court the trial court has to only find it would be in the child's best interest to merit a change, Baker v. Welborn, 77 S.W.3d 711 (Mo. App. S.D. 2002). The trial court failed to state specific findings as to the reasons for its decision to modify custody in favor of the Respondent. In particular the

court made no findings as to how the custody arrangement would effectuate "frequent, continuing and meaningful" contact between Appellant and the minor child, nor did the court make any findings as to any consideration of the relevant factors prescribed in Section 452.375.2 RSMo. The court did not take into consideration the child's wish as articulated by the minor child. (Tr.262). The trial court limited Appellants contact with the child by removing the preference that the Father was to be allowed to care for the minor child while the Mother was at work. By its action the trial court has substantially and significantly affected the Appellant's custodial periods the minor child. The court has found in Loumiet, cited at Loumiet v Loumiet, 103 S.W. 3rd 332 (Mo. App. W.D. 2003), that it is appropriate to abandon the language of primary custody in that provisions of section 452.375 RSMo. defines joint and of sole legal and physical custody whereas primary custody is not part of the statutory provision. The trial court stated that Father time with the child while the Mother was at work was to remain, however it was not included in the formal decree. (Tr. 283, 283).

The appellate courts have been faced before with a similar situation as to a trial court's failure to apply or misapplication of the statutory factors relevant to a child's best interest. In Gross v. Helm, 98 S.W.3d 85 (Mo. App. 2003), the Eastern District Court of Appeals reversed a trial court's decision because "it failed to include a written finding, in its judgment, detailing the specific factors that made its custody arrangement in the best interest of the children," demonstrating a failure to comply with Section 452.375.6 RSMo. This case is distinguishable from Davidson v. Fisher, 96 S.W.3d 160 (Mo. App. 2003), where the Western District Court of Appeals found that a

trial court's failure to discuss each of the statutory factors was not reversible error as long as the court made written findings as to factors most relevant to its custody decision.

Adherence to the legislative mandate for a trial court to make written findings as to the relevant, pertinent factors of Section 452.375.2 RSMo. enables the facilitation of meaningful appellate review. Davidson, 96 S.W.3d at 164. "If written findings are required of the trial court by Section 452.375.6 RSMo., but are not made, the award of child custody will be reversed and the case will be remanded for the court to make the necessary findings and an award in accordance therewith. Bauer v. Bauer, 38 S.W.3d 449,456 (Mo. App. W.D. 2002). In Morse v. Morse, 80 S.W.3d 898, 904 (Mo. App. W.D. 2002), the court reversed a custody award and a support award and remanded to the trial court for entry of a new child custody and support Judgment with written findings.

In the case at hand, there was a clear basis for modification of residential placement due to the Mother's abuse to the child. This resulted in Father seeking to be the residential custodian of the minor child. The trial court need only apply the minimal standards set out in Baker v. Welborn, id at 715. The judgement of the trial court is devoid of the abuse committed by Respondent, the trial court made no written findings as to any of the relevant statutory factors that were pertinent to this its decision. The trial court abused it discretion by simply disregarding the evidence of abuse sustained upon the child by his Mother and concerns the child articulated about that abuse he had and was receiving. The trial court also abused it discretion by failing to consider

the abuse along with the child's wishes to live with his Father. To have done so would not result in the court denying Fathers request for residential placement and certainly would not have resulted in the trial court granting the Mother sole custody along with removing Father from additional contact with the child.

"The character of a parent is a proper subject for consideration by the trial court in determining the custody of a child." Newsom v. Newsom, 976 S.W.2d 33, 39 (Mo. App. W.D. 1998). The trial court ordered sole physical custody to the Respondent. With the admission by Respondent and substantial evidence of abuse, and absent written findings as to factors considered by the trial court, is a failure to meet the minimum requirements of Section 452.375.6 RSMo. Because the trial court did not comply with Section 452.375 RSMo., the trial court's decision as to custody and child support should be reversed.

In the alternative, if this Court should decide that the trial court did comply with statutory requirements, this Court should reverse the trial court's decision because it was not supported with substantial evidence, was against the weight of the evidence, and the welfare of the child requires a different result. A visitation order will be reversed if it is unreasonable in duration or frequency. Hankins v. Hankins, 920 S.W.2d 182, 187 (Mo. App. 1996). Section 452.375.1 RSMo. defines joint physical custody as one that awards each parent significant, though not always equal, periods of time with the children involved. Additionally, Section 452.375.2 RSMo. mandates that joint physical and joint legal custody to both parents, "shall not be denied solely for the reason that one parent opposes a joint physical and joint legal custody award." In

previous orders the parties had joint legal and joint physical custody. The modified Judgment grants the parties joint legal custody with Respondent having primary physical custody, which in reality gave Respondent sole physical custody. The trial court failed to state any findings that would merit modification of the previous custody order of joint legal and joint physical custody. (Tr.42, 45). The trial court has failed to apply the statutory provision of Section 452.410 RSMo. That it is evident by the trial court modifying the prior custody decree and by not finding a change had occurred in the circumstances of the child or his custodian and that the modification the trial court did make was not in the child's best interest. In closing, the trial court said he was not changing anything, however, the formal judgment did change the previous order as to custody and child support. (Tr. 278, L.F. 124-130). The trial court reduced the Appellant's custody by removing his option to have the minor child during Mothers working hours. (Tr. 47). The trial court had stated the modification order was to include this provision, however is was not placed in the formal judgment of modification. (L.F. 283, 284).

When applying the relevant statutory factors of Section 452.375.2 RSMo., Appellants parenting plan should have been followed by the trial court by placing residential placement of the minor child with Appellant. Subsection 2(6) of Section 452.375 RSMo., states as a factor to be considered: "the mental and physical health of all individuals involved, including any history of abuse of any individuals involved. If the court finds that a pattern of domestic violence has occurred, and, if the court finds that awarding custody to the abusive parent is in the best interest of the child, then the

court shall enter written findings of fact and conclusions of law." In Warren v. Warren, 909 S.W.2d 752, 755 (Mo. App. W.D. 1995), the court stated that "[I]n visitation rights matters, appellate court gives deference to the trial court's assessment of what serves the best interests of the child and that judgment should be reversed only if it lacks substantial evidence to support it, it is against the weight of the evidence or erroneously declares or applies the law."

The trial court's decision is an abuse of discretion, is against the weight of the evidence, and is not supported by substantial evidence. Because the trial court awarded Mother sole physical custody to the abusive parent, the Respondent and failed to enter specific written findings of fact or conclusions of law, and then reduced significant custodial periods previously awarded to Appellant is clearly in error.

II

THE APPELLATE COURT SHOULD REVERSE THE TRIAL COURT DECISION BECAUSE ITS DECISION TO MODIFY THE AMOUNT OF CHILD SUPPORT PAID BY APPELLANT AND TO AWARD A CREDIT FOR SUPPORT OF A MINOR CHILD IN RESPONDENT'S PRIMARY CUSTODY WAS NOT SUPPORTED BY CREDIBLE EVIDENCE, WAS EXCESSIVE, WAS AGAINST THE WEIGHT OF THE EVIDENCE AND IS A MISAPPLICATION OF THE LAW; BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT MODIFIED APPELLANT'S CHILD SUPPORT OBLIGATION, BECAUSE THE TRIAL COURT FAILED TO ADHERE TO THE REQUIREMENTS OF SECTION 452.370 RSMO AND 452.340 RSMO, BECAUSE THE TRIAL COURT FAILED TO ENTER FINDINGS REGARDING A CHANGE IN CIRCUMSTANCES MERITING A

MODIFICATION OF THE SUPPORT AMOUNT AND THE AWARD TO RESPONDENT OF A CHILD CREDIT FOR A SUBSEQUENT CHILD IS CONTRARY TO BOTH FORM 14, 2 (C) AND RULE 88 GUIDELINES. THE TRIAL COURT ERRED BY REJECTING THE PARTIES FORM 14 AND NOT SUBMITTING ITS OWN.

Child support is allocated pursuant to the requirements of Section 452.340 RSMo. Subsection 1 of Section 452.340 provides for the following factors to be considered by a court making a child support allocation:

(1) The financial needs and resources of the child;

(2) The financial resources an needs of the parents;

(3) The standard of living the child would have enjoyed had the marriage not been dissolved;

(4) The physical and emotional condition of the child, and the child's emotional needs;

(5) The child's physical and legal custody arrangements, including the amount of time the child spends with each parent and the reasonable expenses associated with the custody or visitation arrangements; and

(6) The reasonable work-related child care expenses of each parent.

Modification of child support lies within the discretion of the trial court, and only an abuse of discretion or misapplication of the law will result in a reversal of the trial court's decision. Estrem v. Estrem, 984 S.W.2d 883, 885 (Mo. App. W.D. 1999). The award by a trial court of child support will not be disturbed on appeal unless the

evidence is palpably insufficient to support it. Hall v. Hall, 53 S.W.3d 214, 221 (Mo. App. S.D. 2001).

In Buckner v. Jordan, 952 S.W.2d 710, 711 (Mo. S.Ct. 1997), the Missouri Supreme Court held that "Rule 88.01 establishes a presumptive amount of child support for child support as calculated pursuant to Form 14. Deviation from the presumptive child support amount is permissible if the trial court makes 'a written finding or a specific finding on the record that the amount so calculated, after consideration of all relevant factors, is unjust and inappropriate'."

To rebut the presumption that the amount of child support calculated according to Form 14 is the amount of child support to be awarded, the court must enter a written or specific finding in the record that the amount so calculated is unjust or inappropriate after considering all of the relevant factors. Hall, 53 S.W.3d at 221.

In the present case no such findings were entered. In fact the trial court rejected the Form 14 prepared by the Appellant, as well as that provided by Respondent. When the trial court rejected the parties form 14 it is required the court adopt it's own form 14 as determined in Davidson V Davidson, 872 S. W. 2d 606 (WD1994) which requires the court to enter findings as to a correct amount. Since the court failed to submitt it's own form14 it is unclear as to how support has been determined in the amount of Two Hundred Sixty-two Dollars and Forty-four cents ($262.44). Appellant, through counsel objected to an increase in child support because it was never pled nor was any allegation ever made that there was a substantial change or a twenty (20%) change. The trial court ordered an increase in support at that time

without any findings as to changed circumstances, therefore committing error by not sustaining the objection by Appellant's counsel as required by Section 452.370 RSMo. (Tr. 282).

The trial court abused its discretion by deviating from the Form 14's submitted by each side without making any written findings as to the relevant statutory factors to be considered. The trial court abused its discretion by modifying Appellant's child support in violation of Form 14, 2(c) and Rule 88.01 of Missouri Civil Procedure.

III

THIS COURT SHOULD REVERSE THE TRIAL COURT DECISION BECAUSE ITS FAILURE TO CONSIDER OR RULE ON PETITIONERS PROPERLY PLED MOTION FOR CONTEMPT AGAINST RESPONDENT FOR DENIAL OF VISITATION WAS MANIFESTLY ARBITRARY, WAS PLAIN ERROR; BECAUSE THE MOTION FOR CONTEMPT WAS PROPER UNDER SECTION 452.400 RSMO (1998), BECAUSE THE TRIAL COURT FAILED TAKE UP AT TRIAL THE MOTION FOR CONTEMPT WHICH WAS PROPERLY PLED AS REQUIRED BY SECTION 509.280.1 RSMO (1998), BECAUSE THE TRIAL COURT DID NOT TAKE THE MOTION UP AT TRIAL WITHOUT GOOD CAUSE THE COURT DID NOT MEET THE REQUIREMENTS OF SECTION 509.370 RSMO (1998).

Section 452.400.3 RSMo provides in part "The court shall mandate compliance with its order by all parties to the action, including parents, children and third parties. In the event of noncompliance the aggrieved person may file a verified motion for contempt." Subsection 1 of Section 509.280 RSMo states an application for an order by the court, unless made during a hearing or at trial shall be in writing, shall state with

particularity the grounds therefor, and shall set forth the relief sought. "All objections raised by motion shall be heard and determined before the trial on application of any party, unless the court for good cause orders that the hearing and determination thereof be deferred until the trial." Section 509.370 RSMo.

In this case, Appellant, Brian Speer, properly pled and filed with the court a Motion for Civil Contempt. (L.F. 65-68). The trial court failed to make a showing of good cause why this matter was not heard prior to trial after show cause had been issued. Additionally, the trial court ignored this matter during the course of the trial and failed to make a determination as to the grounds for the motion or rulings as to the relief sought, and only made a slight reference to it with the trial judge stated, "That was an unfortunate thing, kind of like the birthday. It should have never happened from both sides". (Tr. 283).

The trial court committed plain error in not taking up nor addressing Appellant's properly pled motion. Subsection 9 of Section 452.400 RSMo. states "Motions filed pursuant to this section shall not be deemed an independent civil action from the original action pursuant to which the judgment or order sought to be enforced was entered."

For these reasons the trial court erred by ignoring the properly pled motion of the Appellant for civil contempt. This failure by the trial court to adhere to the statutory requirements is plain error and should be reversed.

CONCLUSION

For the reasons herein, the Appellate Court should reverse the trial court decision not to grant Appellant residential placement of the minor child and in the alternative reverse the trial court's modification of Fathers custody by reducing Appellant's custody periods with the minor child. This court should reverse the trial court's determination as to child support along with its inclusion of a credit for other children born subsequent to the Respondent along with the court's failure to address Appellant's contempt citation.

CERTIFICATE OF SERVICE

The undersigned certifies that two (2) copies of the foregoing, along with a virus free diskette containing Appellant's brief, which complies with Rule 84.06 (b) and contains 6839 words, were served upon Mr. Aaron Farber, attorney of record for the Respondent, by depositing the same in an envelope addressed to said attorney at his address, 119 S. Washington, Neosho, Missouri 64850, as disclosed by the pleadings of record herein, with postage fully paid and by depositing said envelope at the U. S. Post Office in Joplin, Missouri, on the 18th day of November, 2003.

Respectfully submitted,

_____
Sarah Luce Reeder

APPENDIX

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Section 452.340 Dissolution of Marriage, Divorce, Alimony and Separate Maintenance Missouri Revised Statutes

Section 452.340

August 28, 2002

Child support, how allocated--factors to be considered--abatement or termination of support, when--support after age eighteen, when --public policy of state--payments may be made directly to child, when--child support guidelines, rebuttable presumption, use of guidelines, when--retroactivity--obligation terminated, how.

452.340. 1. In a proceeding for dissolution of marriage, legal separation or child support, the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable or necessary for the support of the child, including an award retroactive to the date of filing the petition, without regard to marital misconduct, after considering all relevant factors including:

(1) The financial needs and resources of the child;

(2) The financial resources and needs of the parents;

(3) The standard of living the child would have enjoyed had the marriage not been dissolved;

(4) The physical and emotional condition of the child, and the child's educational needs;

(5) The child's physical and legal custody arrangements, including the amount of time the child spends with each parent and the reasonable expenses associated with the custody or visitation arrangements; and

(6) The reasonable work-related child care expenses of each parent.

2. The obligation of the parent ordered to make support payments shall abate, in whole or in part, for such periods of time in excess of thirty consecutive days that the other parent has voluntarily relinquished physical custody of a child to the parent ordered to pay child support, notwithstanding any periods of visitation or temporary physical and legal or physical or legal custody pursuant to a judgment of dissolution or legal separation or any modification thereof. In a IV-D case, the division of child support enforcement may determine the amount of the abatement pursuant to this subsection for any child support order and shall record

the amount of abatement in the automated child support system record established pursuant to chapter 454, RSMo. If the case is not a IV-D case and upon court order, the circuit clerk shall record the amount of abatement in the automated child support system record established in chapter 454, RSMo.

3. Unless the circumstances of the child manifestly dictate otherwise and the court specifically so provides, the obligation of a parent to make child support payments shall terminate when the child:

(1) Dies;

(2) Marries;

(3) Enters active duty in the military;

(4) Becomes self-supporting, provided that the custodial parent has relinquished the child from parental control by express or implied consent;

(5) Reaches age eighteen, unless the provisions of subsection 4 or 5 of this section apply; or

(6) Reaches age twenty-two, unless the provisions of the child support order specifically extend the parental support order past the child's twenty-second birthday for reasons provided by subsection 4 of this section.

4. If the child is physically or mentally incapacitated from supporting himself and insolvent and unmarried, the court may extend the parental support obligation past the child's eighteenth birthday.

5. If when a child reaches age eighteen, the child is enrolled in and attending a secondary school program of instruction, the parental support obligation shall continue, if the child continues to attend and progresses toward completion of said program, until the child completes such program or reaches age twenty-one, whichever first occurs. If the child is enrolled in an institution of vocational or higher education not later than October first following graduation from a secondary school or completion of a graduation equivalence degree program and so long as the child enrolls for and completes at least twelve hours of credit each semester, not including the summer semester, at an institution of vocational or higher education and achieves grades sufficient to reenroll at such institution, the parental support obligation shall continue until the child completes his or her education, or until the child reaches the age of twenty-two, whichever first occurs. To remain eligible for such continued

parental support, at the beginning of each semester the child shall submit to each parent a transcript or similar official document provided by the institution of vocational or higher education which includes the courses the child is enrolled in and has completed for each term, the grades and credits received for each such course, and an official document from the institution listing the courses which the child is enrolled in for the upcoming term and the number of credits for each such course. If the circumstances of the child manifestly dictate, the court may waive the October first deadline for enrollment required by this subsection. If the child is enrolled in such an institution, the child or parent obligated to pay support may petition the court to amend the order to direct the obligated parent to make the payments directly to the child. As used in this section, an "institution of vocational education" means any postsecondary training or schooling for which the student is assessed a fee and attends classes regularly. "Higher education" means any junior college, community college, college, or university at which the child attends classes regularly. A child who has been diagnosed with a learning disability, or whose physical disability or diagnosed health problem limits the child's ability to carry the number of credit hours prescribed in this subsection, shall remain eligible for child support so long as such child is enrolled in and attending an institution of vocational or higher education, and the child continues to meet the other requirements of this subsection. A child who is employed at least fifteen hours per week during the semester may take as few as nine credit hours per semester and remain eligible for child support so long as all other requirements of this subsection are complied with.

6. The court shall consider ordering a parent to waive the right to claim the tax dependency exemption for a child enrolled in an institution of vocational or higher education in favor of the other parent if the application of state and federal tax laws and eligibility for financial aid will make an award of the exemption to the other parent appropriate.

7. The general assembly finds and declares that it is the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in the best interest of the child except for cases where the court specifically finds that such contact is not in the best interest of the child. In order to effectuate this public policy, a court with jurisdiction shall enforce visitation, custody and child support orders in the same manner. A court with jurisdiction may abate, in whole or in part, any past or future obligation of support and may transfer the physical and legal or physical or legal custody of one or more children if it finds that a parent has,

without good cause, failed to provide visitation or physical and legal or physical or legal custody to the other parent pursuant to the terms of a judgment of dissolution, legal separation or modifications thereof. The court shall also award, if requested and for good cause shown, reasonable expenses, attorney's fees and court costs incurred by the prevailing party.

8. The Missouri supreme court shall have in effect a rule establishing guidelines by which any award of child support shall be made in any judicial or administrative proceeding. Said guidelines shall contain specific, descriptive and numeric criteria which will result in a computation of the support obligation. The guidelines shall address how the amount of child support shall be calculated when an award of joint physical custody results in the child or children spending substantially equal time with both parents. Not later than October 1, 1998, the Missouri supreme court shall publish child support guidelines and specifically list and explain the relevant factors and assumptions that were used to calculate the child support guidelines. Any rule made pursuant to this subsection shall be reviewed by the promulgating body not less than once every three years to ensure that its application results in the determination of appropriate child support award amounts.

9. There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established pursuant to subsection 8 of this section is the correct amount of child support to be awarded. A written finding or specific finding on the record in a judicial or administrative proceeding that the application of the guidelines would be unjust or inappropriate in a particular case, after considering all relevant factors, including the factors set out in subsection 1 of this section, is required if requested by a party and shall be sufficient to rebut the presumption in the case. The written finding or specific finding on the record shall detail the specific relevant factors that required a deviation from the application of the guidelines.

10. Pursuant to this or any other chapter, when a court determines the amount owed by a parent for support provided to a child by another person, other than a parent, prior to the date of filing of a petition requesting support, or when the director of the division of child support enforcement establishes the amount of state debt due pursuant to subdivision (2) of subsection 1 of section 454.465, RSMo, the court or director shall use the guidelines established pursuant to subsection 8 of this section. The amount of child support resulting from the application of the guidelines shall be applied retroactively for a period prior to the

establishment of a support order and the length of the period of retroactivity shall be left to the discretion of the court or director. There shall be a rebuttable presumption that the amount resulting from application of the guidelines under subsection 8 of this section constitutes the amount owed by the parent for the period prior to the date of the filing of the petition for support or the period for which state debt is being established. In applying the guidelines to determine a retroactive support amount, when information as to average monthly income is available, the court or director may use the average monthly income of the noncustodial parent, as averaged over the period of retroactivity, in determining the amount of presumed child support owed for the period of retroactivity. The court or director may enter a different amount in a particular case upon finding, after consideration of all relevant factors, including the factors set out in subsection 1 of this section, that there is sufficient cause to rebut the presumed amount.

11. The obligation of a parent to make child support payments may be terminated as follows:

(1) Provided that the child support order contains the child's date of birth, the obligation shall be deemed terminated without further judicial or administrative process when the child reaches age twenty-two if the child support order does not specifically require payment of child support beyond age twenty-two for reasons provided by subsection 4 of this section;

(2) The obligation shall be deemed terminated without further judicial or administrative process when the parent receiving child support furnishes a sworn statement or affidavit notifying the obligor parent of the child's emancipation in accordance with the requirements of subsection 4 of section 452.370, and a copy of such sworn statement or affidavit is filed with the court which entered the order establishing the child support obligation, or the division of child support enforcement;

(3) The obligation shall be deemed terminated without further judicial or administrative process, when the parent paying child support files a sworn statement or affidavit with the court which entered the order establishing the child support obligation, or the division of child support enforcement, stating that the child is emancipated and reciting the factual basis for such statement; which statement or affidavit is served by the court or division on the child support obligee; and which is either acknowledged and affirmed by the child support obligee in writing, or which is not responded to in writing within thirty days of receipt by the child support obligee;

(4) The obligation shall be terminated as provided by this subdivision by the court which entered the order establishing the child support obligation, or the division of child support enforcement, when the parent paying child support files a sworn statement or affidavit with the court which entered the order establishing the child support obligation, or the division of child support enforcement, stating that the child is emancipated and reciting the factual basis for such statement; and which statement or affidavit is served by the court or division on the child support obligee. If the obligee denies the statement or affidavit, the court or division shall thereupon treat the sworn statement or affidavit as a motion to modify the support obligation pursuant to section 452.370 or section 454.496, RSMo, and shall proceed to hear and adjudicate such motion as provided by law; provided that the court may require the payment of a deposit as security for court costs and any accrued court costs, as provided by law, in relation to such motion to modify.

12. The court may enter a judgment terminating child support pursuant to subdivisions (1) to (3) of subsection 11 of this section without necessity of a court appearance by either party. The clerk of the court shall mail a copy of a judgment terminating child support entered pursuant to subsection 11 of this section on both the obligor and obligee parents. The supreme court may promulgate uniform forms for sworn statements and affidavits to terminate orders of child support obligations for use pursuant to subsection 11 of this section and subsection 4 of section 452.370.

Section 452.370 Modification of judgment as to maintenance or support, when --termination, when--rights of state when an assignment of support has been made--court to have continuing jurisdiction, duties of clerk, clerk to be "appropriate agent", when--severance of responsive pleading.
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Section 452.370

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Modification of judgment as to maintenance or support, when -- termination, when--rights of state when an assignment of support has been made--court to have continuing jurisdiction, duties of clerk, clerk to be "appropriate agent", when--severance of responsive pleading.

452.370. 1. Except as otherwise provided in subsection 6 of section 452.325, the provisions of any judgment respecting maintenance or support may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable. In a proceeding for modification of any child support or maintenance judgment, the court, in determining whether or not a substantial change in circumstances has occurred, shall consider all financial resources of both parties, including the extent to which the reasonable expenses of either party are, or should be, shared by a spouse or other person with whom he or she cohabits, and the earning capacity of a party who is not employed. If the application of the child support guidelines and criteria set forth in section 452.340 and applicable supreme court rules to the financial circumstances of the parties would result in a change of child support from the existing amount by twenty percent or more, a prima facie showing has been made of a change of circumstances so substantial and continuing as to make the present terms unreasonable, if the existing amount was based upon the presumed amount pursuant to the child support guidelines.

2. When the party seeking modification has met the burden of proof set forth in subsection 1 of this section, the child support shall be determined in conformity with criteria set forth in section 452.340 and applicable supreme court rules.

3. Unless otherwise agreed in writing or expressly provided in the judgment, the obligation to pay future statutory maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

4. Unless otherwise agreed in writing or expressly provided in the judgment, provisions for the support of a child are terminated by emancipation of the child. The parent entitled to receive child support shall have the duty to notify the parent obligated to pay support of the child's emancipation and failing to do so, the parent entitled to receive child support shall be liable to the parent obligated to pay support for child support paid following emancipation of a minor child, plus interest.

5. If a parent has made an assignment of support rights to the division of family services on behalf of the state as a condition of eligibility for benefits pursuant to the Temporary Assistance for Needy Families program and either party initiates a motion to modify the support obligation by reducing it, the state of Missouri shall be named as a party to the proceeding. The state shall be served with a copy of the motion by

sending it by certified mail to the director of the division of child support enforcement.

6. The court shall have continuing personal jurisdiction over both the obligee and the obligor of a court order for child support or maintenance for the purpose of modifying such order. Both obligee and obligor shall notify, in writing, the clerk of the court in which the support or maintenance order was entered of any change of mailing address. If personal service of the motion cannot be had in this state, the motion to modify and notice of hearing shall be served outside the state as provided by supreme court rule 54.14. The order may be modified only as to support or maintenance installments which accrued subsequent to the date of personal service. For the purpose of 42 U.S.C. 666(a)(9)(C), the circuit clerk shall be considered the "appropriate agent" to receive notice of the motion to modify for the obligee or the obligor, but only in those instances in which personal service could not be had in this state.

7. If a responsive pleading raising the issues of custody or visitation is filed in response to a motion to modify child support filed at the request of the division of child support enforcement by a prosecuting attorney or circuit attorney or an attorney under contract with the division, such responsive pleading shall be severed upon request.

8. Notwithstanding any provision of this section which requires a showing of substantial and continuing change in circumstances, in a IV-D case filed pursuant to this section by the division of child support enforcement as provided in section 454.400, RSMo, the court shall modify a support order in accordance with the guidelines and criteria set forth in supreme court rule 88.01 and any regulations thereunder if the amount in the current order differs from the amount which would be ordered in accordance with such guidelines or regulations.

Section 452.375 Custody--definitions--factors determining custody--prohibited, when --public policy of state--custody options plan, when required --findings required, when--exchange of information and right to certain records, failure to disclose--fees, costs assessed, when --joint custody not to preclude child support--support, how determined--domestic violence or abuse, specific findings.

Chapter 452

Dissolution of Marriage, Divorce, Alimony and Separate Maintenance

Section 452.375

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Section 452.375 Custody--definitions--factors determining custody--prohibited, when --public policy of state--custody options plan, when required --findings required, when--exchange of information and right to certain records, failure to disclose--fees, costs assessed, when --joint custody not to preclude child support--support, how determined--domestic violence or abuse, specific findings.

452.375. 1. As used in this chapter, unless the context clearly indicates otherwise:

(1) "Custody", means joint legal custody, sole legal custody, joint physical custody or sole physical custody or any combination thereof;

(2) "Joint legal custody" means that the parents share the decision-making rights, responsibilities, and authority relating to the health, education and welfare of the child, and, unless allocated, apportioned, or decreed, the parents shall confer with one another in the exercise of decision-making rights, responsibilities, and authority;

(3) "Joint physical custody" means an order awarding each of the parents significant, but not necessarily equal, periods of time during which a child resides with or is under the care and supervision of each of the parents. Joint physical custody shall be shared by the parents in such a way as to assure the child of frequent, continuing and meaningful contact with both parents;

(4) "Third-party custody" means a third party designated as a legal and physical custodian pursuant to subdivision (5) of subsection 5 of this section.

2. The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including:

(1) The wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties;

(2) The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child;

(3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;

(4) Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent;

(5) The child's adjustment to the child's home, school, and community;

(6) The mental and physical health of all individuals involved, including any history of abuse of any individuals involved. If the court finds that a pattern of domestic violence has occurred, and, if the court also finds that awarding custody to the abusive parent is in the best interest of the child, then the court shall enter written findings of fact and conclusions of law. Custody and visitation rights shall be ordered in a manner that best protects the child and the parent or other family or household member who is the victim of domestic violence from any further harm;

(7) The intention of either parent to relocate the principal residence of the child; and

(8) The wishes of a child as to the child's custodian.

The fact that a parent sends his or her child or children to a home school, as defined in section 167.031, RSMo, shall not be the sole factor that a court considers in determining custody of such child or children.

3. The court shall not award custody of a child to a parent if such parent has been found guilty of, or pled guilty to, a felony violation of chapter 566, RSMo, when the child was the victim, or a violation of chapter 568, RSMo, except for section 568.040, RSMo, when the child was the victim.

4. The general assembly finds and declares that it is the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in the best interest of the child, except for cases where the court specifically finds that such contact is not in the best interest of the child, and that it is the public policy of this state to encourage parents to participate in decisions affecting the health, education and welfare of their children, and to resolve disputes involving their children amicably through alternative dispute resolution. In order to effectuate these policies, the court shall determine the custody arrangement which will best assure both parents participate in such decisions and have frequent, continuing and meaningful contact with their children so long as it is in the best interests of the child.

5. Prior to awarding the appropriate custody arrangement in the best interest of the child, the court shall consider each of the following as follows:

(1) Joint physical and joint legal custody to both parents, which shall not be denied solely for the reason that one parent opposes a joint physical and joint legal custody award. The residence of one of the parents shall be designated as the address of the child for mailing and educational purposes;

(2) Joint physical custody with one party granted sole legal custody. The residence of one of the parents shall be designated as the address of the child for mailing and educational purposes;

(3) Joint legal custody with one party granted sole physical custody;

(4) Sole custody to either parent; or

(5) Third-party custody or visitation:

(a) When the court finds that each parent is unfit, unsuitable, or unable to be a custodian, or the welfare of the child requires, and it is in the best interests of the child, then custody, temporary custody or visitation may be awarded to any other person or persons deemed by the court to be suitable and able to provide an adequate and stable environment for the child. Before the court awards custody, temporary custody or visitation to a third person under this subdivision, the court shall make that person a party to the action;

(b) Under the provisions of this subsection, any person may petition the court to intervene as a party in interest at any time as provided by supreme court rule.

6. If the parties have not agreed to a custodial arrangement, or the court determines such arrangement is not in the best interest of the child, the court shall include a written finding in the judgment or order based on the public policy in subsection 4 of this section and each of the factors listed in subdivisions (1) to (8) of subsection 2 of this section detailing the specific relevant factors that made a particular arrangement in the best interest of the child. If a proposed custodial arrangement is rejected by the court, the court shall include a written finding in the judgment or order detailing the specific relevant factors resulting in the rejection of such arrangement.

7. Upon a finding by the court that either parent has refused to exchange information with the other parent, which shall include but not be limited to information concerning the health, education and welfare of the child, the court shall order the parent to comply immediately and to pay the prevailing party a sum equal to the prevailing party's cost associated with obtaining the requested information, which shall include but not be limited to reasonable attorney's fees and court costs.

8. As between the parents of a child, no preference may be given to either parent in the awarding of custody because of that parent's age, sex, or financial status, nor because of the age or sex of the child.

9. Any judgment providing for custody shall include a specific written parenting plan setting forth the terms of such parenting plan arrangements specified in subsection 7 of section 452.310. Such plan may be a parenting plan submitted by the parties pursuant to section 452.310 or, in the absence thereof, a plan determined by the court, but in all cases, the custody plan approved and ordered by the court shall be in the court's discretion and shall be in the best interest of the child.

10. Unless a parent has been denied custody rights pursuant to this section or visitation rights under section 452.400, both parents shall have access to records and information pertaining to a minor child, including, but not limited to, medical, dental, and school records. If the parent without custody has been granted restricted or supervised visitation because the court has found that the parent with custody or the child has been the victim of domestic violence, as defined in section 455.200, RSMo, by the parent without custody, the court may order that the reports and records made available pursuant to this subsection not include the address of the parent with custody or the child. Unless a parent has been denied custody rights pursuant to this section or visitation rights under section 452.400, any judgment of dissolution or other applicable court order shall specifically allow both parents access to such records and reports.

11. Except as otherwise precluded by state or federal law, if any individual, professional, public or private institution or organization denies access or fails to provide or disclose any and all records and information, including, but not limited to, past and present dental, medical and school records pertaining to a minor child, to either parent upon the written request of such parent, the court shall, upon its finding that the individual, professional, public or private institution or organization denied such request without good cause, order that party to comply immediately with such request and to pay to the prevailing party all costs incurred, including, but not limited to, attorney's fees and court costs associated with obtaining the requested information.

12. An award of joint custody does not preclude an award of child support pursuant to section 452.340 and applicable supreme court rules. The court shall consider the factors contained in section 452.340 and applicable supreme court rules in determining an amount reasonable or necessary for the support of the child.

13. If the court finds that domestic violence or abuse, as defined in sections 455.010 and 455.501, RSMo, has occurred, the court shall make specific findings of fact to show that the custody or visitation arrangement ordered by the court best protects the child and the parent or other family or household member who is the victim of domestic violence or abuse, as defined in sections 455.010 and 455.501, RSMo, from any further harm.

Section 452.400 Visitation rights, defined in detail, when--history of domestic violence, consideration of--prohibited, when--modification of, when--supervised visitation defined--noncompliance with order, effect of--family access motions, procedure, penalty for violation --attorney fees and costs assessed, when.

Chapter 452

Dissolution of Marriage, Divorce, Alimony and Separate Maintenance

Section 452.400

August 28, 2002

452.400 Visitation rights, defined in detail, when--history of domestic violence, consideration of--prohibited, when--modification of, when--supervised visitation defined--noncompliance with order, effect of--family access motions, procedure, penalty for violation --attorney fees and costs assessed, when.

452.400. 1. A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger the child's physical health or impair his emotional development. The court shall enter an order specifically detailing the visitation rights of the parent without physical custody rights. In determining the granting of visitation rights, the court shall consider evidence of domestic violence. If the court finds that domestic violence has occurred, the court may find that granting visitation to the abusive party is in the best interests of the child. The court shall not grant visitation to the parent not granted custody if such parent has been found guilty of or pled guilty to a felony violation of chapter 566, RSMo, when the child was the victim, or a violation of chapter 568, RSMo, except for section 568.040, RSMo, when the child was the victim or an offense committed in another state, when the child is the victim, that would be a felony violation of chapter 566, RSMo, or chapter 568, RSMo, except for section 568.040, RSMo, if committed in Missouri. The court shall consider

the parent's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault on other persons and shall grant visitation in a manner that best protects the child and the parent or other family or household member who is the victim of domestic violence from any further harm. The court, if requested by a party, shall make specific findings of fact to show that the visitation arrangements made by the court best protect the child or the parent or other family or household member who is the victim of domestic violence from any further harm.

2. The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child, but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger the child's physical health or impair his emotional development. When a court restricts a parent's visitation rights or when a court orders supervised visitation because of allegations of abuse or domestic violence, a showing of proof of treatment and rehabilitation shall be made to the court before unsupervised visitation may be ordered. "Supervised visitation", as used in this section, is visitation which takes place in the presence of a responsible adult appointed by the court for the protection of the child.

3. The court shall mandate compliance with its order by all parties to the action, including parents, children and third parties. In the event of noncompliance, the aggrieved person may file a verified motion for contempt. If custody, visitation or third-party custody is denied or interfered with by a parent or third party without good cause, the aggrieved person may file a family access motion with the court stating the specific facts which constitute a violation of the judgment of dissolution or legal separation. The state courts administrator shall develop a simple form for pro se motions to the aggrieved person, which shall be provided to the person by the circuit clerk. Clerks, under the supervision of a circuit clerk, shall explain to aggrieved parties the procedures for filing the form. Notice of the fact that clerks will provide such assistance shall be conspicuously posted in the clerk's offices. The location of the office where the family access motion may be filed shall be conspicuously posted in the court building. The performance of duties described in this section shall not constitute the practice of law as defined in section 484.010, RSMo. Such form for pro se motions shall not require the assistance of legal counsel to prepare and file. The cost of filing the motion shall be the standard court costs otherwise due for instituting a civil action in the circuit court.

4. Within five court days after the filing of the family access motion pursuant to subsection 3 of this section, the clerk of the court shall issue a summons pursuant to applicable state law, and applicable local or supreme court rules. A copy of the motion shall be personally served upon the respondent by personal process server as provided by law or by any sheriff. Such service shall be served at the earliest time and shall take priority over service in other civil actions, except those of an emergency nature or those filed pursuant to chapter 455, RSMo. The motion shall contain the following statement in boldface type: "PURSUANT TO SECTION 452.400, RSMO, YOU ARE REQUIRED TO RESPOND TO THE CIRCUIT CLERK WITHIN TEN DAYS OF THE DATE OF SERVICE. FAILURE TO RESPOND TO THE CIRCUIT CLERK MAY RESULT IN THE FOLLOWING:

(1) AN ORDER FOR A COMPENSATORY PERIOD OF CUSTODY, VISITATION OR THIRD-PARTY CUSTODY AT A TIME CONVENIENT FOR THE AGGRIEVED PARTY NOT LESS THAN THE PERIOD OF TIME DENIED;

(2) PARTICIPATION BY THE VIOLATOR IN COUNSELING TO EDUCATE THE VIOLATOR ABOUT THE IMPORTANCE OF PROVIDING THE CHILD WITH A CONTINUING AND MEANINGFUL RELATIONSHIP WITH BOTH PARENTS;

(3) ASSESSMENT OF A FINE OF UP TO FIVE HUNDRED DOLLARS AGAINST THE VIOLATOR;

(4) REQUIRING THE VIOLATOR TO POST BOND OR SECURITY TO ENSURE FUTURE COMPLIANCE WITH THE COURT'S ORDERS;

(5) ORDERING THE VIOLATOR TO PAY THE COST OF COUNSELING TO REESTABLISH THE PARENT-CHILD RELATIONSHIP BETWEEN THE AGGRIEVED PARTY AND THE CHILD; AND

(6) A JUDGMENT IN AN AMOUNT NOT LESS THAN THE REASONABLE EXPENSES, INCLUDING ATTORNEY'S FEES AND COURT COSTS ACTUALLY INCURRED BY THE AGGRIEVED PARTY AS A RESULT OF THE DENIAL OF CUSTODY, VISITATION OR THIRD-PARTY CUSTODY.".

5. If an alternative dispute resolution program is available pursuant to section 452.372, the clerk shall also provide information to all parties on the availability of any such services, and within fourteen days of the date of service, the court may schedule alternative dispute resolution.

6. Upon a finding by the court pursuant to a motion for a family access order or a motion for contempt that its order for custody, visitation or

third-party custody has not been complied with, without good cause, the court shall order a remedy, which may include, but not be limited to:

(1) A compensatory period of visitation, custody or third-party custody at a time convenient for the aggrieved party not less than the period of time denied;

(2) Participation by the violator in counseling to educate the violator about the importance of providing the child with a continuing and meaningful relationship with both parents;

(3) Assessment of a fine of up to five hundred dollars against the violator payable to the aggrieved party;

(4) Requiring the violator to post bond or security to ensure future compliance with the court's access orders; and

(5) Ordering the violator to pay the cost of counseling to reestablish the parent-child relationship between the aggrieved party and the child.

7. The reasonable expenses incurred as a result of denial or interference with custody or visitation, including attorney's fees and costs of a proceeding to enforce visitation rights, custody or third-party custody, shall be assessed, if requested and for good cause, against the parent or party who unreasonably denies or interferes with visitation, custody or third-party custody. In addition, the court may utilize any and all powers relating to contempt conferred on it by law or rule of the Missouri supreme court.

8. Final disposition of a motion for a family access order filed pursuant to this section shall take place not more than sixty days after the service of such motion, unless waived by the parties or determined to be in the best interest of the child. Final disposition shall not include appellate review.

9. Motions filed pursuant to this section shall not be deemed an independent civil action from the original action pursuant to which the judgment or order sought to be enforced was entered.

Section 590.280 Motions, form of.
Chapter 509
Pleadings
Section 509.280

August 28, 2002

509.280 Motions, Form of.

509.280. 1. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

2. The provisions applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by this code.

Section 509.370 Time for hearing of motions.
Chapter 509
Pleadings
Section 509.370

August 28, 2002

509.370 Time for hearings and Motions

509.370. All objections raised by motion shall be heard and determined before the trial on application of any party, unless the court for good cause orders that the hearing and determination thereof be deferred until the trial.

Supreme Ct. Rule 88.01
Rule 88.01. Presumed Child Support Amount

(a) When determining the correct amount of child support, a court or administrative agency shall consider all relevant factors, including all relevant statutory factors.
(b) There is a rebuttable presumption that the amount of child support calculated pursuant to Civil Procedure Form 14 is the correct amount of child support to be awarded in any judicial or administrative proceeding. Unless a request is filed pursuant to Rule 73.01(c), a written finding or a specific finding on the record by the court or administrative agency that the child support amount under a correctly calculated Form 14, after consideration of all relevant factors, is unjust or inappropriate shall be sufficient in a particular case to rebut the presumption that the amount of child support so calculated is correct.
Source: Section 452.340 RSMo.